86 1695

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1986

ROBERT G. REIBOLDT, JR.,

Petitioner,

v.

STATE OF NEW JERSEY,

Respondent.

WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW JERSEY

APPENDIX

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17 pp

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SUPREME COURT OF NEW JERSEY

C-593 SEPTEMBER TERM 1986

26,196

STATE OF NEW JERSEY
Plaintiff-Respondent,

vs.

ROBERT G. REIBOLDT, JR.,
Defendant-Petitioner.

ON PETITION FOR CERTIFICATION

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-1984-85T4 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Robert N. Wilentz, Chief Justice, at Trenton, this 27th day of February, 1987.

CLERK OF THE SUPREME COURT

DECISION FILED AUGUST 25, 1986

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1984-85-T4

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ROBERT G. REIBOLDT, JR.,

Defendant-Appellant.

Submitted: August 12, 1986 – Decided: August 25, 1986

Before Judges Baime and Ashbey.

On appeal from the Superior Court of New Jersey, Law Division, Middlesex County

Emanuel Gersten, attorney for appellant.

Alan A. Rockoff, Prosecutor, Middlesex County, attorney for respondent (Simon Louis Rosenbach, Assistant Prosecutor. of counsel, Stuart Santiago on the brief).

PER CURIAM

On October 25, 1985 defendant was found guilty in municipal court of driving while under the influence of intoxicating liquor in violation of *N.J.S.A.* § 39:4-50. This conviction was affirmed by the Law Division. Plaintiff appeals and we affirm.

On January 10, 1985 State Trooper Gasior witnessed a motor vehicle accident on the Garden State Parkway. He saw defendant's car strike the passenger side of another car and continue traveling. When Gasior brought defendant's car to a halt, he saw defendant get out of the car and stumble backward onto the highway. Defendant leaned on the car as he walked toward the trooper. Gasior smelled alcohol on defendant's breath and made observations concerning defendant's physical condition, including his slurred speech and his lack of balance. Defendant was placed under arrest and given his *Miranda* [*Miranda v. Arizona*, 384 U.S. 436 (1966)] warnings. On the ride back to headquarters Gasior had further opportunity to observe defendant. He testified it was his opinion defendant was under the influence of alcohol.

At 9:30 p.m. and at 9:50 p.m. defendant's breathalyzer tests were reported to indicate a blood alcohol content of .20 percent. These tests were not considered in the municipal court because the judge found the results unreliable "in that there was a small bore hole" in the unit. Both judges, however, referred to the results of the tests in observing that neither would rely upon them in deciding the case.

On appeal defendant contends that the conviction was not supported by the evidence. He also urges that the recitation of the results of the breathalyzer test by the Law Division judge (even though disregarded by the fact

finder) represented prejudice which could not be cured.

There is no merit to either contention. Evidence was unrefuted that the defendant drove in a dangerous, erratic manner. His motor coordination, manner of speech and smell of alcohol justified the trooper's conclusion that he was under the influence without the necessity of psychomotor tests or tests for alcohol. The findings of the Law Division judge are supported by credible evidence properly admitted and therefore must be respected. *State v. Johnson*, 42 *N.J.* 146, 162 (1964).

We further find no prejudice in the court's references to the excluded tests. In nonjury trials the judge's reference to excluded evidence does not necessarily prejudice appellant's rights. *See State in the interest of R.B.*, 200 *N.J. Super.* 573, 577 (App. Div. 1985).

Affirmed.

ORDER DATED DECEMBER 13, 1985

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STATE OF NEW JERSEY

VS.

ROBERT G. REIBOLDT, JR.

DEFENDANT.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION (CRIMINAL)
MIDDLESEX COUNTY
APPEAL NO. 269-85

ORDER

This matter having been presented to the Court by Emanuel Gersten, attorney for the defendant on appeal from conviction of *N.J.S.A.* 39:4-50(a) in the Municipal Court of Woodbridge, County of Middlesex and State of New Jersey and Assistant Prosecutor Joanne M. Mongon appearing on behalf of the State; and

There being a trial de novo on the transcript and the Court having heard and considered this matter and for other good cause having been shown;

It is on this 13th day of December, 1985;

ORDERED that the defendant is guilty of having violated the provisions of *N.J.S.A.* 39:4-50(a) for which the Court imposed a $400 fine, $15 court costs and $7.75 as costs of this appeal and a $100 surcharge; and it is further

ORDERED that the defendant's driving privileges are hereby suspended for a period of one (1) year and the defendant is sentenced to 12 hours in the Intoxicated Driver's Resource Center, 10 day jail sentence suspended and 5 days community service, and it is further

ORDERED that all fines stayed for 10 days pending filing of appeal.

HONORABLE JOSEPH
SADOFSKI, J.S.C.

SUPERIOR COURT
LAW DIVISION DECISION

THE COURT: That's a two-problem question argument by the defense; one dealing with his constitutional issues. Insofar as the constitutional issues are concerned, the Court will make known his finding on the record, and those can proceed to the Supreme Court of the State of New Jersey.

I have found here that the Miranda warnings given by the policeman in the car sufficient under requirement of our law. Even though he made no acknowledgements, he understood.

I'm satisfied that he understood or should have understood his rights.

The implied consent rule is established by the law of this state. The constitutionality is without question. If it is to be argued, it is to be argued before another forum and not this one.

Now, regarding the instructions of the breathalyzer. Instructions of breathalyzers as established by this state are, I think, standard in nature. They may, in fact, be misleading in that in one effect, the Miranda rights say you have a right to an attorney. With regard to the breathalyzer, you do not have a right to an attorney. Our laws are not clear in all issues. I can read our statutes left and right but we will not – we will have arguments from attorneys throughout the State of New Jersey as to what certain laws mean.

I'm satisfied that the instructions are clear in that their intent is to advise the individual who's being requested for a --to take a breathalyzer test that he has no right to delay

such test and that he has no right to refuse such a test. It would --it would seem to me that the fact that an attorney be present in a breathalyzer test would be in a useless pendage.

Now, dealing further with the facts of this case, it is substantial or substantiated that the breathalyzer had been thrown out. I will not rely upon that in this decision for the sake of the record. We have testimony here from the trooper. Before breathalyzers came into mode and even in the time of their dispute, it is the physical observations and tests which were the determining factors of drunk-driving cases.

It is to be noted here that there were no psychomotor tests given by the trooper. The question then becomes, can the Court sustain a conviction for drunk driving based purely upon observation? I think that the answer must be yes, in this particular case. That answer must be yes in cases where the overwhelming portion of the observation can lead only to one conclusion. One reasonable conclusion that the defendant was, in fact, drunk while driving.

We have here a situation where the trooper was following the defendant's car down the Garden State Parkway, was in a position from 50 yards behind the car observing it driving down the Parkway and for no reason whatsoever nor no explanation, reason, since the date of the accident, the car veered two lanes over to the right and was involved in an accident with a car that was proceeding in the left, fast lane. Whereupon the trooper tried, indeed, to pull the car over. It took some distance for the car to be pulled over by the defendant. In fact, the trooper's testimony was, in fact, that he thought that the defendant was not going to pull his own car over voluntarily.

Then we have the cars parked alongside the road of

the Garden State Parkway whereby the defendant gets out of the car and proceeds to stagger in the traffic lane of the Parkway. The situation is testified to by the trooper and, frankly, known to all individuals of reasonable aptitude that it is dangerous to stand in a travel lane of the Garden State Parkway.

The defendant then proceeds unsteadily walking to the rear of the car between the trooper's car and his car with the assistance of the trooper to get him off the highway. Whereupon this trooper then observed a strong odor of alcohol and observed bloodshot eyes and droopy eyelids. He's leaning on the car. He's tripping over his feet. The individual is then placed in the trooper's car where a strong odor of alcohol is observed during the transport to the police barracks.

The defendant remains in a very talkative state, allbeit it's a possibility that it's nervousness on behalf of the defendant, but taking in the context of all the other physical observations in this case which amount to evidence, I think, that also is inclusive. We cannot take one of these items of evidence and separate them.

I think in order to determine the true facts of the case, we must take the observations in total to see if they accumulate to a reasonable degree of certainty.

I am satisfied in this case that the observations as listed by this Court accumulate well beyond a reasonable degree of certainty and affirm the judgment below finding the defendant guilty of drunk driving.

TRIAL COURT DECISION
Transcript 56-58

THE COURT: Having heard the evidence before the Court, it is clear to this trier of the facts that there was some discrepancy with regard to the breathalyzer testing in that there was a small bore hole with regard to the breathalyzer in use of the 900A unit, number 93147 at the time and accordingly with regard to the testing of the breathalyzer taken at the barracks, despite the testimony of the Trooper that that would be favorable to the defendant, I feel that it raises some doubt in my mind as to the accuracy of the breathalyzer itself. Therefore I will confine my findings with regard to this matter strictly to what occurred at the roadside up and to the time the defendant was placed under arrest for drunken driving, and I will not place any weight upon the breathalyzer unit itself. The testimony before the Court which is uncontested at this time, is that the defendant was traveling in the right lane of the highway in Woodbridge Township and for no apparent reason he veered across two lanes of travel to his left and struck a car in that lane on the right side, with his left side, the damage being testified to by the police officer being present there. With respect to that, the defendant did give no explanation whatsoever with regard to this erratic driving and in fact according to the Trooper, stated he had no memory with regard to how this occurred, other than the impact. The defendant was identified by the Trooper as the driver of that vehicle and this observation of the erratic driving of the defendant was observed by this trooper certainly within more than a reasonable distance as testified to. The defendant was then observed not being in any apparent need of medical treatment, never requested it, medical treatment and showed no signs of being injured when he exited from his car, at which time the Trooper observed him leaning on the car, unable to stand and upon getting close to him as he stumbled toward the Trooper

and actually stumbled into the portion of the traveled highway backward, the Trooper when confronting him at a close distance, had the strong alcoholic odor on the defendant's breath. The defendant continued swaying, leaning for balance, sagging at the knees, had bloodshot eyes and droopy eyelids and based upon all of these factors observed by the Trooper, as well as the fact that I stated before, that he did not remember anything regarding his erratic driving, which precipitated this whole matter. The defendant was read his Miranda Rights and advised he was being arrested for driving under the influence and while being transferred in the police vehicle, the defendant continued to emit a strong odor of alcohol in the trooper's car, while traveling to the Bloomfield barracks and his manner of being very talkative as the Trooper has testified to, was a factor again along with the many other factors which lead the Trooper to believe that this defendant was clearly under the influence at the time. I feel based upon this evidence, it is more than the necessary burden required by the State beyond a reasonable doubt and I feel that the defendant is truly guilty of the violation of driving while under the influence, a violation of 39:4-50 and I'm going to find him Guilty.

EXCERPT FROM MOTION TO SUPPRESS STATEMENT OF FACTS & LAW

1. The arrest and procedure reports filed by the trooper involved in this matter, the facts and circumstances described therein, show conclusively that the trooper violated the defendant's constitutional rights; he erred in his procedures in exacting statements, results of tests and evidence of alleged incriminating effect.

The trooper failed to properly and did concurrently advise the defendant of the safeguards enunciated in the case of Miranda v. Arizona 384 U.S. 436 (1966), with the "rights" under paragraph #36 of the "drinking-driving report" which were inconsistent and in conflict with each other; thereby leaving the defendant in a compelled and confused manner and defendant not in a position to properly understand his "rights".

The test requested under said paragraph #36 is unconstitutional in that it violates the 4th, 5th, 6th and 14th Amendments of the U.S. Constitution, which are also applicable to the States.

DENIAL OF MOTION TO SUPPRESS
Transcript 10-12

THE COURT: With regard to the argument on the constitutionality of the breathalyzer, clearly under Macy (phonetic) vs. Montrin (phonetic) 4043 U.S. 1, that the constitutionality was upheld; therefore, I'm going to overrule the objection with regard to that. Based upon your Implied Consent, it's clear and it's been a (indiscernible) here in the state of New Jersey as well as numerous and probably all the states throughout the United States, that there was the intent of the legislature with regard to this particular aspect of the motor vehicle statute, to give protection to the public from the dangerous threat of drunk drivers and notwithstanding limiting the rights of that drunk driver under those circumstances. . . . Accordingly, I overrule the objection with regard to the Implied Consent. Going further on with regard to the Miranda Warnings, under Berkimer vs. McCarty, it is clearly stated that the Miranda Warnings, effective from that date, of that case, must now be given when the questioning of a police officer changes from the point of interrogation to the point of custodial apprehension and that will be part of the case of the evidence to be put in and that will be determined at that time, unless you wish to have a voir dire at this time, in which instance we will put the police officer on and hear the arguments with regard to the Miranda. Otherwise, I will reserve decision on that pending the evidence put in before the Court. . . . Last but not least, regarding these small bore holes, hole or whatever it was in the particular breathalyzer machine, at the time, that is the aspect of the reading that would be testified to as to what effect it has on the machine, if any, when in fact it may prove to be favorable to your client and not unfavorable to your client, based upon the facts of the expert's testimony under the circumstances. That remains a factor to be heard under the case. Overall, the objection

is overruled, the case will proceed.

IMPLIED CONSENT STATUTE

39:4-50.2. Consent to taking of samples of breath; record of test;independent test; prohibition of use of force; informing accused.

(a) Any person who operates a motor vehicle on a public road, street or highway or quasi-public area in this State shall be deemed to have given his consent to the taking of samples of his breath for the purpose of making chemical tests to determine the content of alcohol in his blood; provided, however, that the taking of samples is made in accordance with the provisions of this act and at the request of a police officer who has reasonable grounds to believe that such person has been operating a motor vehicle in violation of the provisions of R.S. 39:4-50.

. . . .

(c) In addition to the samples taken and tests made at the direction of a police officer hereunder, the person tested shall be permitted to have such samples taken and chemical tests of his breath, urine or blood made by a person or physician of his own selection.

(d) The police officer shall inform the person tested of his rights under subsections (b) and (c) of this section.

(e) No chemical test, as provided in this section, or specimen necessary thereto, may be made or taken forcibly and against physical resistance thereto by the defendant. The police officer shall, however, inform the person arrested of the consequences of refusing to submit to such test in accordance with section 2 of this amendatory and supplementary act. A standard statement, prepared by the director, shall be read by the police officer to the person under arrest.